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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROSE MARIE ACAJABON,

Defendant and Appellant.

F067381

(Super. Ct. No. 12CM0820)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Donna Tarter, Judge.

J. Peter Axelrod, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Amanda D. Cary, and Lewis A. Martinez, Deputy Attorneys General for Plaintiff and Respondent.

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On March 25, 2013, appellant, Rose Marie Acajabon, was charged in connection with her role in the shooting death of Armando Ramirez, Jr. Acajabon had served as the driver, while one of her passengers, Jason Reyes, carried out the shooting. Acajabon was

charged with one count of first degree murder (count 1; Pen. Code, § 187, subd. (a)), with the information further alleging that she had acted as an aider and abettor in the shooting, and that the killing had been carried out by means of lying in wait within the meaning of Penal Code section 190.2, subdivision (a)(15). Following a jury trial, Acajabon was found guilty of the lesser-included offense of second degree murder. She was sentenced to a term of 15 years to life in prison, along with various fees and fines.

On appeal, Acajabon argues that (1) the trial court erred by excluding an out-of-court statement made to the police by the shooter; (2) Acajabon was denied the effective assistance of counsel by her attorney's failure to secure the shooter as a witness at trial; (3) the trial court erred by failing to instruct the jury on the doctrine of imperfect self-defense; and (4) the trial court erred by instructing the jury that it could find murder to be a natural and probable consequence to the transportation of methamphetamine. We do not find any of these arguments persuasive, and the judgment is affirmed.

FACTS

The salient facts are as follows: On March 5, 2012, Acajabon drove Jason Reyes and Donald Simpson into Hanford from Alameda County. Upon arriving in Hanford, the group met up with Reyes's daughter, Michelle Reyes, and the four spent the afternoon smoking marijuana and consuming methamphetamine. Although Michelle had previously met Simpson, this was her first contact with Acajabon, whom her father referred to as "wifey." Later in the afternoon, after purchasing a train ticket back to Alameda for Simpson, the four stopped for food at a local McDonalds drive-through. At approximately 5:15 p.m., while the group was parked outside of the McDonald's restaurant, Reyes stated that he had been thinking about "what he wanted to do" to a man named Armando Ramirez who lived in Hanford and had previously been convicted of

molesting Michelle.¹ Ramirez ended up serving nine years in prison for the offense. Still in the parking lot, Reyes informed the group that he had thought a lot about what Ramirez had done to Michelle and that he wanted to “get that fool” or “[w]e are going [to] get that fool.”

After leaving the McDonald’s parking lot, Acajabon stopped at a red light, and Michelle noticed that Ramirez was a passenger in an adjacent car. Acajabon and Michelle were in the front seats with Simpson and Jason in the rear. As the car containing Ramirez made a left-hand turn into a nearby Rite-Aid, Reyes pulled out a handgun and told Acajabon to turn into the Rite-Aid as well. Being in the incorrect lane to make a left-hand turn, Acajabon drove her car over the divider to reach the Rite-Aid parking lot and then maneuvered her car into a parking spot facing the exit. Reyes exited the vehicle, approached Ramirez, and fatally shot him.

Afterwards, Reyes climbed back into Acajabon’s car and she drove away from the scene, back to Michelle’s apartment complex. Upon arriving at the complex, Acajabon, Reyes, and Michelle switched cars, and Simpson disappeared. Acajabon, Reyes, and Michelle spent the evening at a local drug house, and, at some point during the night, Acajabon and Reyes left Hanford. The two were later apprehended by police in Ventura, and Acajabon was subsequently convicted on one count of second degree murder.²

¹Tyla Gray, Michelle’s mother, met Ramirez in Delano State Prison while visiting Reyes, also an inmate at the time. After Ramirez’s release, he and Gray lived together for five months, during which time Michelle was molested.

²Reyes was found incompetent to stand trial and Simpson, who was arrested shortly after fleeing from Acajabon’s car, was tried as a codefendant of Acajabon’s and acquitted of all charges. Michelle was granted immunity in exchange for her testimony at Acajabon’s trial.

DISCUSSION

I. Trial court did not err by excluding offered out-of-court statements by Jason Reyes

Acajabon alleges that the trial court erred by excluding an out-of-court statement by Reyes to the effect that Acajabon did not know Reyes was going to shoot Ramirez. We disagree. We review the admission or exclusion of evidence for an abuse of discretion. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1337-1338.)

A. Background

During trial, defense counsel for Acajabon sought to admit out-of-court statements made to the police by Reyes under the hearsay exception for statements against penal interest per Evidence Code section 1203. In the statements, Reyes told police that he had no plans to kill Ramirez that day and that it was “spur of the moment,” and when asked if anyone else knew, he *may* have said, “No, it was fate.” The People objected to the admission of the statements and, following oral argument, the trial court excluded the evidence, finding that defense counsel had not shown that Reyes was unavailable to testify and that the statement that Acajabon was unaware the shooting was going to take place was not a statement against Reyes’s penal interest.

Following the conclusion of trial, Acajabon’s counsel filed a motion for new trial, renewing his assertion that Reyes’s out-of-court statements should have been admitted. Counsel argued that the statements were against Reyes’s penal interest, and that Reyes was unavailable to testify as he was incompetent to stand trial and the hospital where he was committed had refused to comply with a court order to produce Reyes in court. After written briefing by the parties, the trial court denied Acajabon’s motion. The trial court found that the statements were against Acajabon’s penal interest, not Reyes’s; that incompetence to stand trial is not the same as incompetence to testify; and that Acajabon’s counsel failed to exercise due diligence in obtaining Reyes as a witness as

counsel had not sought a continuance and had failed to timely serve Reyes's hospital with the court order to produce him at trial.

B. Reyes's statements were not against his penal interest

Pursuant to Evidence Code section 1200, hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." The parties do not dispute that the statement by the shooter, Reyes, is offered for its truth, specifically that Acajabon did not know that a shooting was about to take place. Once established as hearsay, the next step is to determine whether an exception to the rule applies.

Under Evidence Code section 1230, otherwise inadmissible hearsay may be admitted "if the declarant is unavailable as a witness and the statement, when made ... so far subjected him to the risk of civil or criminal liability ... that a reasonable man in his position would not have made the statement unless he believed it to be true." Here, Acajabon argues that Reyes's out-of-court statement that no one in the car knew that Reyes was going to shoot Ramirez was against Reyes's penal interest and should have been admitted. We disagree.

Setting aside for the moment the issue of Reyes's availability as a witness, it is simply not the case that the portions of Reyes's statements that Acajabon's counsel sought to admit were contrary to Reyes's penal interest. While it is true that Reyes admitted to killing Ramirez in his statement to police, Acajabon sought to admit the portions of the statement where Reyes claimed that Acajabon did not have knowledge of Reyes's intent to kill, and that the crime was "spur of the moment." Evidence Code section 1230, however, is "inapplicable to evidence of any statement or portion of a statement not itself specifically disserving TO the interests of the declarant." (*People v. Lawley* (2002) 27 Cal.4th 102, 153.)

Here, the portion of Reyes's statement concerning Acajabon's lack of foreknowledge does nothing in disservice to Reyes's penal interests. In fact, Reyes's

assertion that the crime was “spur of the moment” could be interpreted as an attempt to mitigate Reyes’s culpability for such charges as premeditated murder or conspiracy to commit murder. “[T]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession’s non-self-inculpatory nature.” (*People v. Lawley, supra*, 27 Cal.4th at p. 153, quoting *Williamson v. United States* (1994) 512 U.S. 594, 599-600.) Accordingly, while Reyes’s confession to shooting Ramirez was self-inculpatory, that confession did not increase the credibility of the non-self-inculpatory portions of Reyes’s statement concerning Acajabon’s lack of foreknowledge, and the trial court was correct to exclude the statements from evidence.

Moreover, in light of the close relationship between Reyes and Acajabon (introduced as “wifey” by Reyes to Michelle), Reyes certainly had motivation to minimize Acajabon’s culpability, making his statement all the less trustworthy. “The question of “whether a statement is self-inculpatory or not can only be determined by viewing it in context.” [Citations.] And to determine whether the statement is trustworthy, the trial court ““may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant’s relationship to the defendant.””” (*People v. Vasquez* (2012) 205 Cal.App.4th 609, 620, italics added, quoting *People v. Duarte* (2000) 24 Cal.4th 603, 612.)³

C. Reyes was not unavailable to testify

Even if Reyes’s statements had been against his penal interest, they were still inadmissible under Evidence Code section 1230 as there was no showing that Reyes was unavailable as a witness. On appeal, Acajabon asserts two separate reasons why Reyes

³During the “unavailability” portion of the argument below came another statement from Reyes “confessing” to the effect of “[Y]ou will let the DA know it just happened so I won’t face the death penalty.” Clearly, the statements offered were not against Reyes’s penal interest and not necessarily trustworthy.

was unavailable as a witness. First, Acajabon notes that Reyes was found incompetent to stand trial himself and therefore was not competent to testify at Acajabon's trial. We disagree.

Under Evidence Code section 240, subdivision (a)(3), a declarant is unavailable as a witness if the declarant is "unable to attend or to testify at the hearing because of then-existing physical or mental illness or infirmity." While section 240 does not specifically define what qualifies as a mental illness or infirmity, Evidence Code section 701, subdivision (a), states that an individual is disqualified from testifying if he or she is "(1) [i]ncapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or [¶] (2) [i]ncapable of understanding the duty of a witness to tell the truth." By contrast, "[a] defendant is incompetent to stand trial if he or she lacks a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—[or lacks] ... a rational as well as a factual understanding of the proceedings against him." [Citations.]'" (*People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1032.)

Given this difference in definitions between capacity to testify and capacity to stand trial, we cannot conclude that the trial court abused its discretion by refusing to accept evidence of incapacity to stand trial as sufficient to establish incapacity to testify. The standards are simply not the same, and the trial court was fully entitled to require a more detailed showing of unavailability by Acajabon, who bore the burden of proving that Reyes was not competent to testify. (*People v. Dennis* (1998) 17 Cal.4th 468, 525.)

Second, Acajabon asserts that, even if Reyes were competent to testify, he was unavailable to testify because his presence could not be secured by service of process, despite the due diligence of Acajabon's trial counsel. Again, we disagree.

Under Evidence Code section 240, subdivision (a)(5), a declarant is unavailable as a witness if the declarant is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her

attendance by the court's process." Diligence "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character." (*People v. Linder* (1971) 5 Cal.3d 342, 347.) Relevant considerations include, ""whether the search was timely begun [citation], the importance of the witness's testimony [citation], and whether leads were competently explored [citation]."" (*People v. Cromer* (2001) 24 Cal.4th 889, 904.)

Here, Acajabon asserts that her trial counsel exercised due diligence by serving a transportation order on the hospital where Reyes was committed, but that the hospital refused to comply with the order. The record shows, however, that the order was signed on March 22, 2013, but was not delivered to the hospital by Acajabon's trial counsel until March 26, 2013, the day after trial began. The record also shows that Acajabon's counsel did not request a continuance after the hospital refused to comply with the transportation order, nor did he alert the trial court to the hospital's refusal to comply until April 2, 2013, five court days after the trial had commenced. Given this timeline, it is difficult to describe counsel's efforts to secure Reyes as "timely," "persevering," or "untiring." (*People v. Cromer, supra*, 24 Cal.4th at p. 904; *People v. Linder, supra*, 5 Cal.3d at p. 347.) As such, we do not find that the trial court abused its discretion by finding that counsel failed to exercise due diligence in securing Reyes as a witness, and that Reyes was therefore not unavailable under Evidence Code section 240, subdivision (a)(5).

II. Acajabon was not denied effective assistance of counsel

Acajabon argues in the alternative that, if this court concludes Reyes was not unavailable as a witness, her trial counsel was ineffective for failing to secure Reyes as a witness at trial. We disagree. A claim of ineffective assistance of counsel presents a mixed question of law and fact. (*People v. Jones* (2010) 186 Cal.App.4th 216, 235.) We review the questions of law de novo, and "[t]he factual findings of a trial court are entitled to deference 'only if substantial and credible evidence supports the findings.' [Citations.]" (*Id.* at p. 236.)

“The test for determining whether a criminal defendant received ineffective assistance of counsel is well-settled. The court must first determine whether counsel’s representation ‘fell below an objective standard of reasonableness.’ [Citation.] The court then inquires whether ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ [Citations.]” (*People v. Jones, supra*, 186 Cal.App.4th at pp. 234-235.) Here, while counsel’s failure to exercise due diligence in securing Reyes as a witness can be construed as falling below an objective standard of reasonableness, Acajabon has not, and cannot, establish prejudice.

Had Reyes been secured as a witness and testified at trial, presumably his testimony would have been that he killed Ramirez and that he acted on the “spur of the moment.” Testimony that Acajabon had no knowledge that Reyes was intending to commit murder would have been conclusory and speculative in light of the evidence adduced in trial and inadmissible for that basis. Lay witnesses may not give conjectural lay opinions. (See *People v. Thornton* (2007) 41 Cal.4th 391, 429.) The evidence presented at trial, however, established that Reyes had stated in Acajabon’s presence that he wanted to “get” Ramirez; Reyes told Acajabon to follow the car carrying Ramirez when they observed Ramirez beside them at a traffic light; Reyes had a firearm; Acajabon followed the car and positioned her car in the Rite-Aid parking lot so as to be as close to the exit as possible; and Acajabon waited for Reyes to return to the car before driving away from the scene.

Even if produced at trial, the best testimony Reyes could offer is that he did not discuss a plan to “get” Ramirez; however, given the uncontroverted evidence above, a jury may have concluded from Reyes’s hypothetical testimony, *if believed*, that Acajabon had no knowledge that Reyes intended to commit a murder *before* observing Ramirez in traffic, and that Acajabon knew or should have known that Reyes intended to kill Ramirez as soon as he directed Acajabon to follow the car in which Ramirez was riding.

As Acajabon's conviction for second degree murder requires only intent and not premeditation, there was ample evidence to support her conviction, even if Reyes had testified in the manner in which Acajabon asserts he would have. Therefore, there is no reasonable probability that the result of the proceeding would have been different if Acajabon's trial counsel had secured Reyes as a witness, and Acajabon was not denied the effective assistance of counsel.

III. Trial court did not err by failing to instruct jury on imperfect self-defense

Next, Acajabon argues that the trial court erred by failing to issue a sua sponte jury instruction on the lesser-included offense of voluntary manslaughter due to imperfect self-defense. We disagree.

A trial court has no duty to instruct on self-defense unless there is substantial evidence to support the defense. (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1355.) Imperfect self-defense applies when "the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." (*People v. Barton* (1995) 12 Cal.4th 186, 201.) While imperfect self-defense does not justify a homicide, it may mitigate murder to voluntary manslaughter by negating the element of malice required for murder. (*People v. Randle* (2005) 35 Cal.4th 987, 994.)

Here, Acajabon claims that the doctrine of imperfect self-defense applied to this case as she assisted Reyes in killing Ramirez because she was afraid Reyes would kill her if she did not. This, however, is not a claim of imperfect self-defense; it is a claim of duress, which neither justifies nor mitigates murder. (*People v. Anderson* (2002) 28 Cal.4th 767, 780, 783.) Indeed, "[i]n contrast to a person killing in imperfect self-defense, a person who kills an innocent believing it necessary to save the killer's own life intends to kill unlawfully," and "[n]othing in the statutes negates malice in that situation." (*Id.* at p. 783.)

Accordingly, even if Acajabon's claim of fear for her life is accepted as true, her decision to assist in the killing of an innocent bystander in order to save her own life

made her actions unlawful, and the doctrine of imperfect self-defense inapplicable. The court in *Anderson* concluded that, “as in Blackstone’s England, so today in California: fear for one’s own life does not justify killing an innocent person. Duress is not a defense to murder. We also conclude that duress cannot reduce murder to manslaughter.

Although one may debate whether a killing under duress should be manslaughter rather than murder, if a new form of manslaughter is to be created, the Legislature, not this court, should do it.” (*People v. Anderson, supra*, 28 Cal.4th at p. 770.)

Therefore, we find no error in the trial court’s decision not to instruct the jury on the lesser-included offense of voluntary manslaughter due to imperfect self-defense.

IV. Acajabon not prejudiced by trial court’s instruction that jury could find murder a natural and probable consequence of transportation of methamphetamine

At trial, the jury was instructed that it could find Acajabon guilty of murder if it found that the murder was a “natural and probable consequence” of the transportation of methamphetamine. On appeal, Acajabon argues that she was prejudiced by this instruction. While we agree that the instruction was erroneous, we disagree that Acajabon was prejudiced by it. We review de novo a claim that a court failed to instruct on the applicable principles of law. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.)

During jury instructions, the trial court informed the jury that Acajabon was guilty of murder (i) if she was guilty of transporting methamphetamine; (ii) if, during the commission of that transportation of methamphetamine, a coparticipant in that crime committed murder; and (iii) if a reasonable person in Acajabon’s position would have known that the commission of murder was a natural and probable consequence of the commission of transporting methamphetamine.

While this instruction was an accurate statement of the “natural and probable consequences” doctrine, a trial court should only issue this instruction when “(1) the record contains substantial evidence that the defendant intended to encourage or assist a

confederate in committing a target offense, and (2) the jury could reasonably find that *the crime actually committed* by the defendant's confederate was a 'natural and probable consequence' of *the specifically contemplated target offense*." (*People v. Prettyman* (1996) 14 Cal.4th 248, 269, italics added.)

In this case, however, there is no articulable dispute that the murder of Ramirez had anything to do with the transportation of methamphetamine. Instead, the murder was wholly motivated by Reyes's desire to "get" Ramirez in retaliation for the crimes Ramirez had committed against Reyes's daughter, Michelle. To say that the revenge murder of Michelle's abuser was a natural and probable consequence of Acajabon's transportation of methamphetamine with Reyes strains the natural-and-probable-consequences doctrine beyond the breaking point. Accordingly, we find that the instruction should not have been given.

Despite that, the issuance of an improper instruction is not, in isolation, sufficient to merit the reversal of a conviction. The instruction was, however, an accurate statement of the "natural and probable consequences" doctrine. Instructional error on natural and probable consequences is analyzed to see whether there is a reasonable probability the jury applied the instruction in an unconstitutional manner. (*People v. Hickles* (1997) 56 Cal.App.4th 1183, 1195.) We find no such error.

When a jury is presented with both a supported and unsupported ground for conviction, reversal is only required if there is an "affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a *reasonable trier of fact* could find the defendant guilty beyond a reasonable doubt." (*Id.* at p. 1126.) "An appellate court necessarily operates on the assumption that the jury has acted reasonably, unless the record indicates otherwise." (*Id.* at p. 1127.)

Here, while the jury was instructed on the unsupported “natural and probable consequences” theory of murder, it was also instructed that murder was the killing of another human being with malice aforethought, and was instructed that “[a] person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator.”

“‘A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.’ [Citations.]” (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) As noted above, a review of the evidence presented at trial shows Reyes had stated in Acajabon’s presence that he wanted to “get” Ramirez; Reyes told Acajabon to follow the car carrying Ramirez when they observed Ramirez beside them at a traffic light; Reyes had a firearm; Acajabon followed the car and positioned her car in the Rite-Aid parking lot so as to be as close to the exit as possible; and Acajabon waited for Reyes to return to the car before driving away from the scene. Therefore, while the evidence may not have supported a murder conviction under the “natural and probable consequences” theory, there was an abundance of evidence to support a finding that Acajabon aided and abetted Reyes in the murder of Ramirez.

Similarly, the jury was told that, as to the instructions given, “Some of these instructions may not apply, depending on your findings about the facts of this case. Do not assume just because I [the court] give a particular instruction that I [the court] am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them.” The court will presume, absent evidence to the contrary contained in the record, that the jury followed the instructions given and found that the natural-and-probable-consequences instruction was factually inapplicable. This assumption is appropriately buttressed by the substantial evidence of Acajabon’s aiding and abetting, which was previously discussed.

Lastly, the record provides no indication that the jury relied on the unsupported “natural and probable consequences” theory and not the supported theory of accomplice liability for an intentional killing committed with malice aforethought. In the absence of such “affirmative indication in the record that the verdict actually did rest on the inadequate ground,” Acajabon’s conviction must stand. (*People v. Guiton, supra*, 4 Cal.4th at p. 1129.)

DISPOSITION

The judgment is affirmed.

Smith, J.

WE CONCUR:

Levy, Acting P.J.

Peña, J.